No. 12950

United States
Court of Appeals
For the Ninth Circuit.

NORTH UMBERLAND MINING COMPANY, a Corporation,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

DONALD ARMSTRONG,
1308 Sartori Ave.,
Torrance, Calif.

For Appellee:

BAUDER, GILBERT, THOMPSON & KELLY,
939 Rowan Bldg.,
Los Angeles 13, Calif.

In the District Court of the United States, Southern District of California, Central Division
No. 5729 C

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a Corporation,
Plaintiff,

vs.

HOME INDEMNITY COMPANY OF NEW YORK, a Corporation, GEORGE WHITE, JAMES CARL FITZGERALD, JAMES RICHARD OSBORNE, MICHAEL LEE and PATRICIA LEE,
Defendants.

NORTH UMBERLAND MINING COMPANY, a Corporation,
Intervener.

COMPLAINT IN INTERVENTION

The above-entitled Court by order heretofore made having granted intervener leave to intervene, intervener for complaint in intervention alleges:

I.

Intervener at all times herein mentioned was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Nevada and is a citizen and resident of said state.

II.

That plaintiff, Standard Accident Insurance Company of [2*] Detroit, a corporation, at all times

*Page numbering appearing at foot of page of original Certified Transcript of Record.

herein mentioned was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Michigan and is a citizen and resident of said state.

III.

That the defendant, Home Indemnity Company of New York, a corporation, at all times herein mentioned was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of said state.

IV.

That at all times herein mentioned defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, were, and now are, residents and citizens of the State of California residing in the Southern District of California.

V.

That the amount in controversy in this action exceeds the sum of $3000.00 exclusive of interest and costs.

VI.

That intervener, North Umberland Mining Company, on and prior to the 20th day of July, 1946, was the owner of the Lincoln Zephyr automobile mentioned in paragraph VIII of plaintiff's complaint filed in the within action.

VII.

That intervener is informed and believes, and

therefore alleges, that on the 20th day of July, 1946, defendant, George White, was driving the Lincoln Zephyr automobile described in paragraph VI hereof in the County of San Diego, State of California, with the consent of said intervener and did then and there run into and collide with one Claude McLester Lee and one Leana Mae Osborne Lee, and as a result of the injuries sustained in said collision said Claude McLester Lee and said Leana Mae Osborne Lee died. [3]

VIII.

That on or about the 6th day of August, 1946, defendants, Michael Lee and Patricia Lee, commenced an action in the Superior Court of the State of California, in and for the County of San Diego, entitled "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their Guardian ad litem, Plaintiffs, vs. George White, John Doe and Doe Corporation, a corporation, Defendants," being numbered No. 134918 in the files of said court, and that in the complaint filed by them in said action the said plaintiffs alleged that they were the children of said Claude McLester Lee and his sole surviving heirs at law; that the death of said Claude McLester Lee was caused by the negligence of the defendant, George White, while operating a Lincoln Zephyr automobile hereinbefore in paragraph VI described, and that by reason of the death of said Claude McLester Lee they were damaged in the sum of $50,000.00.

IX.

That on or about the 1st day of August, 1946, defendants, James Carl Fitzgerald and James Richard Osborne, commenced an action in the Superior Court of the State of California, in and for the County of San Diego, entitled "James Carl Fitzgerald, a minor, by and through his Guardian ad litem, James Richard Osborne, and James Richard Osborne, Plaintiffs, vs. George White and North Lumberland Mining Company, Defendants," being numbered No. 134630 in the files of said court, and that in the complaint filed by them in said action the said plaintiffs alleged that defendant, James Carl Fitzgerald, was the son of the aforesaid Leana Mae Osborne Lee, and that James Richard Osborne was the father of said Leana Mae Osborne Lee, and that said James Carl Fitzgerald is the sole heir at law of said Leana Mae Osborne Lee; that the death of said Leana Mae Osborne Lee was caused by the negligence of the defendant, George White, while operating a Lincoln Zephyr automobile hereinbefore in [4] paragraph VI described, and that by reason of the death of said Leana Mae Osborne Lee they were damaged in the sum of $50,500.00.

X.

That thereafter intervener was duly and regularly served with a copy of the complaint and summons in each of the actions referred to in paragraphs VIII and IX hereof; that thereafter and within the time allowed by law intervener filed its answer in each of said actions.

XI.

That thereafter and on January 19, 1948, in said action No. 134630, judgment was entered in favor of plaintiffs therein and against defendants, George White and North Umberland Mining Company, in the sum of $4,000.00; that thereafter and on January 19, 1948, in said action No. 134918 judgment was entered in favor of plaintiffs therein and against defendants, George White and North Umberland Mining Company, in the sum of $4750.00; that thereafter and on January 19, 1948, defendant, North Umberland Mining Company, paid and satisfied each of said judgments by paying to plaintiffs in said action No. 134630 the sum of $4000.00 and to plaintiffs in action No. 134918 the sum of $4750.00.

XII.

Intervener incorporates by reference paragraphs VIII, IX, X, XI, XII, and XIII of plaintiff's complaint on file in the within cause.

XIII.

A controversy exists between plaintiff, Standard Accident Insurance Company of Detroit, defendant, George White, and intervener, North Umberland Mining Company, in that intervener is informed and believes that George White claims, and intervener claims, that plaintiff, Standard Accident Insurance Company of Detroit, is liable under the policy described in paragraph XI of plaintiff's [5] complaint herein for any money which defendant, George White, is required to pay intervener by rea-

son of the payment and satisfaction of the judgments as aforesaid, and plaintiff claims that it is not liable or required to pay intervener by reason of the payment and satisfaction of the judgments aforesaid; intervener claims that defendant, George White, is liable to it in the sum of $8750.00 by reason of its having paid and satisfied the judgments aforesaid, and said George White claims that he does not owe intervener anything on account of its having paid and satisfied said judgments.

XIV.

That intervener's claim is based upon common questions of law and fact involved in the main action.

Wherefore, intervener prays for a decree as follows:

1. For a declaration of the respective rights, duties and liabilities of intervener, North Umberland Mining Company, defendant, George White, and plaintiff, Standard Accident Insurance Company of Detroit.

2. That the court declare that the defendant, George White, is obligated to intervener in the sum of $8750.00, together with interest thereon at the rate of seven (7) per cent per annum from and after January 19, 1948.

3. That this court declare that plaintiff, Standard Accident Insurance Company of Detroit, is obligated to George White in the sum of $8750.00, together with interest thereon at the rate of seven

(7) per cent per annum from and after January 19, 1948, under the terms of its policy which said policy is attached to plaintiff's complaint in the within action and marked "Exhibit A."

4. For intervener's costs and for such other and further relief as shall seem just and equitable.

/s/ DONALD ARMSTRONG,
Attorney for Intervener.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 11, 1950. [6]

[Title of District Court and Cause.]

ANSWER OF STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT TO COMPLAINT IN INTERVENTION

Comes now plaintiff, Standard Accident Insurance Company of Detroit, a corporation, and answering the complaint in intervention of intervener, North Umberland Mining Company, a corporation, alleges as follows:

I.

Plaintiff admits the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XII, XIII and XIV of the complaint in intervention. [9]

II.

Answering paragraph XI, plaintiff admits that

on or about the dates therein alleged judgments were entered in the actions therein described and in the amounts therein set forth, and upon information and belief alleges the facts to be that North Umberland Mining Company, a corporation, did not pay either or both of said judgments or amounts therein alleged and in that regard alleges that said judgments and the amounts therein set forth were paid by defendant Home Indemnity Company of New York, a corporation, pursuant to its policy of automobile liability insurance referred to and described in plaintiff's complaint and issued to intervener Northumberland Mining Company, a corporation. Further answering said paragraph this answering plaintiff alleges that each and both of said judgments were entered pursuant to a stipulation for the entry of said judgments and without the consent or approval of this answering plaintiff.

III.

Further answering the complaint in intervention, this plaintiff admits that a controversy does exist as described in intervener's complaint and in that regard this plaintiff contends that if said George White did, after the occurrence of the accident described and referred to in the complaint in intervention, breach the terms of the policy issued by Home Indemnity Company of New York on his part to be performed, and did thereby release and excuse Home Indemnity Company of New York from its obligations under said policy, then defend-

ant George White was and is obligated to pay any expense incurred in the defense of either or both of said actions referred to in the complaint in intervention, and to pay any judgments rendered against him therein up to but not beyond the amount which except for said breach of said policy defendant Home Indemnity Company of New York would have been obligated to pay, and that said plaintiff was not obligated to defend either or both of said actions [10] or to pay any portion of either or both of said judgments, and that plaintiff further contends that if defendant George White failed to cooperate with defendant Home Indemnity Company of New York and did thereby breach the terms and conditions of the policy issued by defendant Home Indemnity Company of New York, he likewise failed to cooperate with this plaintiff under and in accordance with the terms of its policy referred to and described in the complaint in intervention and annexed as an exhibit to plaintiff's complaint in the above-entitled action, and that this plaintiff has by reason of such failure of cooperation been released from any obligation under its policy.

IV.

Denies that this answering plaintiff is indebted or obligated to intervener, Northumberland Mining Company, a corporation, or to defendant George White, or either of them, in the sum or sums referred to in the complaint on file herein, or in any other sum or sums whatsoever, or at all.

Wherefore, plaintiff prays:

(1) For a declaration of the respective rights, duties and liabilities of the intervener, Northumberland Mining Company, defendant, George White and plaintiff, Standard Accident Insurance Company of Detroit;

(2) That if this court find and so decree that defendant, George White, has breached the conditions of the policy of insurance issued by Home Indemnity Company of New York, which is described in the complaint on file herein and referred to and made a part of the complaint in intervention, and that thereby Home Indemnity Company of New York has been released from its obligations to the defendant, George White, thereunder, then this court adjudge and declare that this plaintiff was not obligated to defend action No. 134918 or said action No. 134630, or either of them, but that its [11] sole obligation under its said policy, if this court decrees that defendant George White did not breach the policy issued to him by plaintiff, was to pay only such portion of any judgment or judgments that might be rendered against said George White, after a trial on the merits of any action commenced against him, or after judgment entered pursuant to any stipulation agreed to by this plaintiff, as shall be in excess of the insurance that would have been available to said George White had he not breached the terms and conditions of said policy of insurance issued by defendant Home Indemnity Company of New York as in the complaint alleged, and in the complaint in intervention referred to;

(3) That this court find, declare and decree that plaintiff, Standard Accident Insurance Company of Detroit, under the facts alleged and referred to in the complaint in intervention, is not obligated in any amount whatsoever to intervener, Northumberland Mining Company, a corporation, or to defendant George White, or either of them, in the sum or sums referred to in the complaint in intervention, or in any other sum or sums whatsoever, or at all.

(4) For costs of suit and such other and further relief as shall seem just and equitable.

BAUDER, GILBERT,
THOMPSON & KELLY,

By /s/ EVERETT W. THOMPSON,
Attorneys for Plaintiff Standard Accident Insurance Company of Detroit, a Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 22, 1950. [12]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN RE ISSUES RAISED BY COMPLAINT IN INTERVENTION AND ANSWERS THERTO

Statement of Facts

For a full detailed statement of all facts established in the main action we refer the court to the

case of Home Indemnity Company of New York v. Standard Accident Insurance Company, 167 Fed. (2) 919. For convenience and brevity herein, the Home Indemnity Company of New York will be referred to as "Home" and the Standard Accident Insurance Company of Detroit as "Standard," and Mr. George White as "White."

The complaint in intervention and answers thereto, we believe, do not at this time require a detailed statement of all of the facts contained in the reported case, but in order to [14] properly determine the questions involved they do require a brief statement of basic facts that pertain to the intervention proceeding.

Briefly, the essential facts are that after the United States District Court, in the main action for declaratory relief, ruled that Home was obligated under its policy to defend and indemnify White in the actions brought against him in the Superior Court of San Diego County, Home, pursuant to a stipulation for judgment entered into between counsel representing the plaintiffs in the state court actions and counsel employed by Home and representing the intervener (who was a defendant in the state court action), and separate counsel representing defendant White, but not with consent of or pursuant to any stipulation entered into by counsel representing Standard, stipulated that judgments be entered in favor of the plaintiffs in the state court actions and against the intervener, North Umberland Mining Company, a corporation, and White. The judgments so stipulated were entered

at the time and in the sums mentioned in the complaint in intervention. Home paid and satisfied the stipulated judgments entered against its named insured, North Umberland Mining Company. Thereafter the United States Court of Appeals for the Ninth Circuit reversed the judgment entered in the District Court and held that as the result of the failure of White to cooperate with Home following the automobile accident which gives rise to the causes of action commenced in the state court, it was not obligated or required to defend or indemnify White in either of said actions. According to the late Federal Judge J. F. T. O'Connor, in a memorandum decision by him in this case following the decision of the United States Court of Appeals, the only issue that was decided in the declaratory relief action and by the United States Court of Appeals was whether or not Home was required to defend and indemnify White in the state court actions (see Standard v. Home, 82 Fed. Supp. 945). He states no other issue was decided. [15]

Plaintiff in intervention now seeks a judgment in this court declaring the rights, duties and liabilities, if any, of the various parties and that the court declare that White is obligated to intervener in the sums referred to in the complaint and that Standard is obligated to White under the terms of the policy issued by Standard and marked "Exhibit A" attached to the Standard complaint in the main action.

Standard denies that it is obligated to intervener or its indemnitor, Home, in the sums referred to

in the complaint or in any other sum or sums whatsoever, or at all. Standard's contentions, among others, are that at the time of the accident the Home policy afforded White valid and collectible insurance up to the limits stated in the policy and that the insurance afforded White under the Standard policy at the time of the accident clearly was only excess insurance, and that White by his voluntary breach of the cooperation clause of the Home policy cannot prejudice the rights of Standard.

The Home policy provided coverage far exceeding the total prayers for judgment in the state court actions and which insurance under the Home policy would have been available and would have satisfied any judgment entered or prayed for in the state court actions had it not been for the voluntary lack of cooperation on the part of White.

Memorandum of Law Involved

Point I.

It cannot be disputed that at the moment that the accident occurred, and probably from the time White got into the intervener's automobile, the Home policy was existing and primary insurance in full force and effect and the Standard policy solely excess insurance.

Zurich v. Clamor,
124 Fed. (2) 717; [16]
Gutner v. Switzerland,
32 Fed. (2) 700;
Air Transport v. Employers, etc.,
91 C.A. (2) 129, at 131; 204 Pac. (2) 647;
See our comment on page 7;

Gillies v. Michigan Millers, etc., Ins. Co. (Aug. 18, 1950), 98 A.C.A. 959, at 957;
Maryland Casualty Co. v. Hubbard, 22 Fed. Supp. 697 (1938, U.S.D.C., Judge Yankwich);
Couch on Insurance, Vol. 5, page 3636, note 12;
Lehigh Valley, etc., v. Providence, etc., 127 Fed. 364.

The only reasonable interpretation that can be given to the Home policy and the Standard policy as of the moment of the occurrence of the accident which gave rise to the cause of action asserted in the state courts is that the Home policy was primary insurance up to the limits therein specified and the Standard policy was solely excess insurance over and above the limit afforded under the Home policy.

This conclusion is irresistible and arises out of the undisputed facts that at the time of the accident White was operating the vehicle insured by the Home policy and described in its policy and registered to the Home insured. He was operating it with the permission and consent of the Home insured, and therefore became an insured under said policy (see Home policy Insuring Agreement III). He had all the benefits flowing to an insured under said policy.

White was not operating a vehicle registered to or owned by him and described in his policy with Standard. The only clause of the Standard policy which gave White any protection at the time of the

accident was the clause referred to under Insuring Agreement VIII, entitled "Temporary Use of Substitute Automobile," and which agreement is and was controlled by Condition 13 of said policy, [17] which provides in part:

> "* * * The insurance under Insuring Agreements VI and VIII shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under either or both of said Insuring Agreements."

The only event that caused the Home policy to subsequently be declared unavailable to White was his voluntary breach of its conditions.

Point II.

The Home policy was valid and collectible insurance available to White.

In American Lumbermen's etc., v. Lumber Mutual Casualty Co., 295 N. Y. S., 321, at page 324, the court says:

> "We interpret the words 'total amount of collectible and valid insurance' to mean insurance which is capable of protecting the insured. It merely excludes invalid or illegal insurance (such as insurance which is voidable for misrepresentation) and uncollectible insurance (such as insurance of an insolvent company) from the computation of total insurance for the

purposes of apportionment. These words were so construed by this court in Balzer v. Globe Indemnity Co., 206 N. Y. S. 777, in in Lamb v. Belt Casualty Co., 3 C.A. (2) 624, 40 Pac. (2) 311, and the same interpretation was adopted by the California court. [18]

Point III.

White's voluntary breach of the cooperation clause of the Home policy should not be permitted to prejudice the rights of Standard.

It has been clearly established that at the time of the accident the Home policy specifically covered the car operated by White, was valid and collectible primary insurance, and that White was an insured under the Home policy by its express terms. It has also been shown that the only insurance at the time of the accident Standard afforded to White was excess insurance over and above the limits stated in the Home policy and that the loss did not exceed such limits. This is not a case wherein for some failure on the part of the Home insured to pay a premium or because of a breach of a warranty, or because of the insolvency of Home at the time of the accident the Home policy had become invalid or uncollectible. It is simply and only a case wherein White's voluntary act constituted lack of cooperation and therefore a breach of the condition of the Home policy. Standard's rights should not be prejudiced thereby.

The policies issued by Home and Standard were issued in contemplation that the assured would

comply with the conditions on his part to be performed under the policy. It should take little argument to convince a reasonable mind that the premium exacted by Standard of White would have been much greater indeed had Standard ever contemplated that a voluntary act on behalf of its insured would ipso facto convert that which is expressly declared in the policy to be excess insurance into primary insurance. If an insured by his voluntary act releases one insurer of any obligation under its policy, by the same token the rights of the excess insurer should not be permitted in law, equity or good conscience to be prejudiced and defeated by such voluntary act. The insured should bear the loss, not the innocent carrier. The rights of the intervener are no [19] greater than the rights of the insured insofar as an interpretation of the provisions of each policy is concerned (See 167 Fed. (2) 919, at 929).

If White by his voluntary act chooses to breach the Home policy, Standard should not be compelled or obligated thereby to pay any portion of any judgment secured against White or the insured under the Home policy by stipulation or otherwise until White has paid on said judgment the amount of the liability of Home as expressed in its policy limits and which was available and would have been paid under its just contractual obligation had it not been for the voluntary act of White.

The Air Transport Case

We believe that the reasoning and logic employed in the Air Transport case (91 C.A. (2) 129) is ap-

plicable to the case at bar. In the first place, the court in the cited case states on page 131 as follows:

> "To determine the liability of Employers at this time, if any, we must first determine the respective liabilities, if any, of Employers and Pacific Indemnity at the date of the accident." (Emphasis ours.)

Substituting Home and Standard for Employers and Pacific Indemnity, respectively, one can only come to the conclusion that the liabilities of Home and Standard, if any, must be determined as of the date of the accident in question. Further, if one substitutes primary and excess insurance in place of concurrent insurance into the reasoning of the cited case and puts Home in the place of Pacific Indemnity Company in that case, and Standard in the place of Employers, it would seem to follow logically and naturally that the obligation of Standard as an excess carrier became fixed no later than at the time of the accident and remained in that category even though the insured, White, forfeited his [20] rights under the Home policy.

Inasmuch as the limits of liability under the Home policy at the time of the accident far exceeded the judgments prayed for or entered in the state court actions, and similarly the claims of the intervener herein, and inasmuch as the insurance afforded by Home was valid and collectible at the time of the accident and was primary insurance, and that afforded by Standard at the time of the accident was solely and exclusively excess insurance, it is sub-

mitted that Standard should not be compelled to pay any portion or part of the judgments entered in the state court actions, and for which intervener seeks judgment in this proceeding, and, further, that the judgment of this court should and must be in favor of Standard.

Respectfully submitted,

BAUDER, GILBERT,
THOMPSON & KELLY,

By /s/ EVERETT W. THOMPSON,
Attorneys for Plaintiff.

[Endorsed]: Filed December 14, 1950. [21]

At a stated term, to wit: The February Term, A. D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 3rd day of January, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER

This cause having been heard and submitted to the Court, and the Court having duly considered the matter, the Court now finds for and against the re-

spective parties as follows, and it is ordered that findings of fact, conclusions of law and judgment be drawn accordingly:

(1) The Court finds in favor of the intervening plaintiff North Umberland Mining Company and against the defendant George White, and that said intervening plaintiff is entitled to recover the sum of $8,750.00, together with interest at 7% from January 19, 1948, and costs herein, from said defendant;

(2) The Court finds that the plaintiff Standard Accident Insurance Company is not obligated to anyone on its policy, without costs.

(3) The Court finds that the defendant Home Indemnity Company is not obligated to anyone on its policy, without costs.

(4) The action having become moot as to the defendants Fitzgerald, Osborne, Michael Lee, Patricia Lee and Taylor, no relief will be granted as to these defendants.

(5) The Court adopts the memorandum of Bauder, Gilbert, Thompson and Kelly, filed December 14, 1950, as reflecting its reasoning, to aid counsel in preparing findings, conclusions and judgment in lieu of a formal Opinion. Counsel for North Umberland Mining Company will prepare and present findings of fact, conclusions of law and judgment pursuant to Local Rule 7, within 10 Days. [22]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on regularly for trial on December 22, 1950, before the above-entitled court, the Honorable James M. Carter, Judge, presiding, upon the complaint in intervention of North Umberland Mining Company, Intervener, and the answer of plaintiff, Standard Accident Insurance Company of Detroit, thereto and the answer of the defendant, George White, thereto, and oral and documentary evidence having been introduced by the respective parties, and the cause having been argued and submitted to the [23] Court for decision, the Court, now being fully advised and informed in the premises, makes the following findings of fact:

I.

Intervener at all times herein mentioned was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Nevada and is a citizen and resident of said state.

II.

That plaintiff, Standard Accident Insurance Company of Detroit, a corporation, at all times herein mentioned was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Michigan and is a citizen and resident of said state.

III.

That the defendant, Home Indemnity Company

of New York, a corporation, at all times herein mentioned was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of said state.

IV.

That at all times herein mentioned defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, were and now are, residents and citizens of the State of California, residing in the Southern District of California.

V.

That the amount in controversy in this action exceeds the sum of $3000.00 exclusive of interest and costs.

VI.

That on and prior to the 20th day of July, 1946, intervener, North Umberland Mining Company, was the owner of a certain Lincoln Zephyr automobile, and that prior to said 20th day [24] of July, 1946, defendant, Home Indemnity Company of New York, issued in the State of Nevada to said North Umberland Mining Company its policy of automobile liability insurance, which said policy is attached to and made a part of the answer of defendant, Home Indemnity Company of New York.

VII.

That on the 20th day of July, 1946, defendant, George White, was driving the Lincoln Zephyr automobile described in paragraph VI hereof in the

County of San Diego, State of California, with the consent of said intervener and did then and there run into and collide with one Claude McLester Lee and one Leana Mae Osborne Lee, and as a result of the injuries sustained in said collision said Claude McLester Lee and said Leana Mae Osborne Lee died.

VIII.

That on or about the 6th day of August, 1946, defendants, Michael Lee and Patricia Lee, commenced an action in the Superior Court of the State of California, in and for the County of San Diego, entitled "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their Guardian ad litem, Plaintiffs, vs. George White, John Doe and Doe Corporation, a corporation, Defendants," being numbered No. 134918 in the files of said court, and that in the complaint filed by them in said action the said plaintiffs alleged that they were the children of said Claude McLester Lee and his sole surviving heirs at law; that the death of said Claude McLester Lee was caused by the negligence of the defendant, George White, while operating a Lincoln Zephyr automobile hereinbefore in paragraph VI described, and that by reason of the death of said Claude McLester Lee thy were damaged in the sum of $50,000.00.

IX.

That on or about the 1st day of August, 1946, defendants, [25] James Carl Fitzgerald and James Richard Osborne, commenced an action in the Superior Court of the State of California, in and for

the County of San Diego, entitled "James Carl Fitzgerald, a minor, by and through his Guardian ad litem, James Richard Osborne, and James Richard Osborne, Plaintiffs, vs. George White and North Umberland Mining Company, Defendants," being numbered No. 134630 in the files of said court, and that in the complaint filed by them in said action the said plaintiffs alleged that defendant, James Carl Fitzgerald, was the son of the aforesaid Leana Mae Osborne Lee, and that James Richard Osborne was the father of said Leana Mae Osborne Lee, and that said James Carl Fitzgerald is the sole heir at law of said Leana Mae Osborne Lee; that the death of said Leana Mae Osborne Lee was caused by the negligence of the defendant, George White, while operating a Lincoln Zephyr automobile hereinbefore in paragraph VI described, and that by reason of the death of said Leana Mae Osborne Lee they were damaged in the sum of $50,500.00.

X.

That thereafter intervener was duly and regularly served with a copy of the complaint and summons in each of the actions referred to in paragraphs VIII and IX hereof; that thereafter and within the time allowed by law intervener filed its answer in each of said actions.

XI.

That thereafter and on January 19, 1948, in said action No. 134630, judgment was entered in favor of plaintiffs therein and against defendants, George

White and North Umberland Mining Company, in the sum of $4,000.00; that thereafter and on January 19, 1948, in said action No. 134918 judgment was entered in favor of plaintiffs therein and against defendants, George White and North Umberland Mining Company, in the sum of $4750.00; that thereafter and on January 19, 1948, defendant, North Umberland [26] Mining Company, paid and satisfied each of said judgments by paying to plaintiffs in said action No. 134630 the sum of $4000.00 and to plaintiffs in action No. 134918 the sum of $4750.00, and that defendant, George White, has never paid anything on account of said judgments to anyone. That each of said judgments herein described was entered without a trial on the merits of either action and pursuant to a stipulation entered into between counsel representing the plaintiffs in each of said state court actions and counsel employed by defendant George White and counsel representing the intervener, and that plaintiff did not agree to or stipulate to either of said judgments; that defendant Home Indemnity Company of New York did pay and satisfy each of said judgments for and on behalf of its named insured, the intervener.

XII.

That said Home Indemnity Company of New York did, by the terms of said policy, agree that it would pay all sums, not exceeding $100,000.00 for the injury or death of one person or $300,000.00 for the injury or death of more than one person in the same accident, which said North Umberland Mining

Company, or any person using or operating said Lincoln Zephyr automobile with the permission of said North Umberland Mining Company, should become obligated to pay by reason of the liability imposed upon them, or either of them, by law for damages on account of bodily injury or death at any time resulting from or suffered, or alleged to have been suffered, by any person or persons due to any accident as result of the ownership, use, operation or maintenance of said Lincoln Zephyr automobile; and that the said Home Indemnity Company of New York, under the terms of said policy, did further agree that it would, at its own cost and expense, investigate all accidents alleged to have occurred as result of the operation of said Lincoln Zephyr automobile, and would, at its own cost and expense, defend and care for on behalf of each person assured under said policy all [27] suits or actions at law brought as result of any such accident, even if groundless.

XIII.

That on or about the 29th day of September, 1945, plaintiff, Standard Accident Insurance Company of Detroit, issued to the defendant, George White, in the State of California, a certain policy of automobile liability insurance, wherein and whereby it agreed to pay, on behalf of said George White, all sums which he should become obligated to pay by reason of the liability imposed upon him by law for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident arising out

of the ownership, maintenance or use of a certain 1942 Packard five-passenger convertible coupe, not exceeding, however, the sum of $25,000.00 for the bodily injury or death of one person, or $50,000.00 for more than one person injured or killed in one accident.

XIV.

That by the terms of said policy plaintiff, Standard Accident Insurance Company of Detroit, further agreed that if the automobile described in said policy issued by it to the defendant, George White, should be withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, the insurance afforded by said policy with respect to the automobile described therein should apply with respect to any other automobile not owned by said George White while temporarily used as a substitute for the automobile described in said policy, but that by the terms of said policy it was further provided that such insurance as to the use of said substituted automobile should be excess insurance over any other valid and collectible insurance available to said George White under a policy applicable with respect to the substituted automobile or otherwise against loss covered by either [28] or both of said insuring agreements; that a photostatic copy of said policy is annexed to the complaint of Standard Accident Insurance Company of Detroit.

XV.

That the Packard automobile described in paragraph XIII hereof and described in the policy of

insurance issued by plaintiff, Standard Accident Insurance Company of Detroit, to said George White was withdrawn from normal use because of breakdown or repair, and on the 20th day of July, 1946, and while said Packard automobile was broken down and under repair, defendant, George White, was driving the aforesaid Lincoln Zephyr automobile, the property of Intervener, North Umberland Mining Company, in the County of San Diego, State of California, with the consent of said North Umberland Mining Company, and did then run into and collide with one Claude McLester Lee and one Leana Mae Osborne Lee, and as a result of the injuries sustained in said collision said Claude McLester Lee and said Leana Mae Osborne Lee died.

XVI.

That defendant, George White, in reporting the accident hereinabove referred to gave to defendant, Home Indemnity Company of New York, false, conflicting and misleading statements and reports of said accident, and that said George White thereby breached the conditions of the policy of insurance issued by said Home Indemnity Company of New York, and that by reason of such breach defendant, Home Indemnity Company of New York, was excused from the performance as to George White of its obligations under its policy of insurance issued by it as aforesaid; that said policy of insurance contains conditions material to the assumption by Home Indemnity Company of New York of the risks incident to such insurance, among other things that

the said George White should cooperate with the Company and that said George White should not assume any obligations incident to the happening of any accident insured against; that in violation [29] of said conditions said George White failed, neglected and refused to cooperate with Home Indemnity Company of New York in the matter of the investigation of the facts of said accident and in the handling of claims arising therefrom by giving to said Home Indemnity Company of New York false, misleading and conflicting statements as to the facts of said accident and his connection therewith and by voluntarily entering a plead of guilty to a criminal charge of the violation of the provisions of Section 480 of the Vehicle Code of the State of California in respect to the accident referred to.

That all of the matters and things found by this paragraph occurred after July 20, 1946.

XVII.

The court finds that the rights and liabilities of defendant George White, defendant Home Indemnity Company of New York, and plaintiff Standard Accident Insurance Company of Detroit, became and were fixed not later than the time of the accident above referred to; that at the time of said accident George White had other valid and collectible and available insurance within the meaning of the provisions of the policy issued to him by Standard Accident Insurance Company of New York, namely, the insurance provided for and afforded to him by the policy issued to the intervener, North Umberland Mining Company, by defendant Home Indem-

nity Company of New York; that the subsequent breach of the provisions and conditions of the policy of insurance of Home Indemnity Company of New York by the defendant George White did not alter or change the rights or liabilities of the plaintiff, Standard Accident Insurance Company of Detroit, as the excess carrier; that the insurance afforded by the policy of plaintiff, Standard Accident Insurance Company of Detroit, was and now is solely excess insurance over and above a sum equal to the limits of the insurance afforded to the defendant George White by the policy of Home Indemnity Company of New York, and which latter insurance was [30] valid and collectible and available to George White at the time of said accident.

From the foregoing Findings of Fact the Court draws the following

Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter of this action.

2. Intervener, North Umberland Mining Company, is entitled to judgment against defendant, George White, in the sum of $8,750.00, together with interest at the rate of seven per cent (7%) per annum from January 19, 1948, together with its costs.

3. Plaintiff, Standard Accident Insurance Company of Detroit, is not obligated to anyone under its policy, the subject of this action.

Done in open Court at Los Angeles, California, this 25th day of January, 1951.

/s/ JAMES M. CARTER,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged January 15, 1951.

[Endorsed]: Filed January 25, 1951. [31]

In the District Court of the United States, Southern District of California, Central Division

No. 5729-C Civil

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a Corporation,
Plaintiff,

vs.

HOME INDEMNITY COMPANY OF NEW YORK, a Corporation, GEORGE WHITE, JAMES CARL FITZGERALD, JAMES RICHARD OSBORNE, MICHAEL LEE and PATRICIA LEE,
Defendants,

NORTH UMBERLAND MINING COMPANY, a Corporation,
Intervener.

JUDGMENT

This action having come on regularly for trial on December 22, 1950, before the above-entitled court,

the Honorable James M. Carter, Judge presiding, upon the complaint in intervention of North Umberland Mining Company, Intervener, and the answer of plaintiff, Standard Accident Insurance Company of Detroit, thereto and the answer of the defendant, George White, thereto, and oral and documentary evidence having been introduced by the respective parties, and the cause having been argued and submitted to the Court for decision and the court having been fully informed and advised in the premises and having made its Findings of Fact and [33] Conclusions of Law,

Now, Therefore, It Is Adjudged and Decreed as Follows:

1. That intervener, North Umberland Mining Company, have judgment against defendant, George White, in the sum of $8750.00 and for the additional sum of $1849.37, which is interest on $8750.00 at the rate of seven per cent (7%) per annum from January 19, 1948, to date, to wit a total judgment of $10,599.37 together with costs taxed in the sum of $.....

2. The Court declares that plaintiff, Standard Accident Insurance Company of Detroit, is not obligated to anyone under the terms of its policy.

3. The action, insofar as it applies to defendants, Fitzgerald, Osborne, Michael Lee, Patricia Lee and Taylor, having become moot, none of said defendants is entitled to any relief.

4. Defendant, Home Indemnity Company of New

York, is not obligated to anyone under the terms of its policy.

5. Plaintiff, Standard Accident Insurance Company of Detroit, and defendant, Home Indemnity Company of New York, are not entitled to costs.

Done in open court at Los Angeles, California, this 25th day of January, 1951.

/s/ JAMES M. CARTER,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged January 15, 1951.

[Endorsed]: Filed January 25, 1951. [34]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Donald Armstrong, being first duly sworn, deposes and says: That at all times herein mentioned he was and now is the Attorney for Intervener North Umberland Mining Company in the above-entitled action; that his client desires to appeal from a judgment entered in said action in so far as said judgment is in favor of Standard Accident Insurance Company of Detroit and against said Intervener.

The time to appeal from said judgment under

rule 73(a) [36] of the rules for United States District Courts has expired unless this Court extends such time pursuant to the provisions of said rule 73(a).

Said Judgment was entered January 25, 1951. Affiant through inadvertence permitted the thirty day period provided for by said rule 73(a) to expire because he was not aware of the entry of said Judgment and did not receive notice of such entry.

Wherefore affiant prays that this Court make its Order extending the time for Intervener North Umberland Mining Company to appeal to March 26, 1951.

Subscribed and sworn to before me this 20th day of March, 1951.

/s/ DONALD ARMSTRONG.

[Seal] /s/ BORIS S. WOOLLEY,
Notary Public in and
For Said County and State.

My commission expires June 15, 1951.

Upon reading the foregoing affidavit, upon application of Donald Armstrong, Attorney for Intervener North Umberland Mining Company, and good cause appearing therefor,

It Is Ordered that said Intervener's time to appeal from the Judgment entered in the above-

entitled cause on January 25, 1951, be and it is hereby extended to March 26, 1951.

Dated: March 20, 1951.

/s/ BENJAMIN HARRISON,
United States District Judge.

[Endorsed]: Filed March 20, 1951. [37]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR ORDER RECONSIDERING EX PARTE ORDER OF MARCH 20, 1951, EXTENDING TIME TO APPEAL AND FOR ORDER VACATING SAME, POINTS AND AUTHORITIES AND AFFIDAVIT OF EVERETT W. THOMPSON IN SUPPORT OF SAID MOTION.

To the Intervener, North Umberland Mining Company, a Corporation, and to Donald Armstrong, Esq., Its Attorney:

You and Each of You Take Notice that the plaintiff, Standard Accident Insurance Company of Detroit, a Corporation, will move the above-entitled court, in Court Room No. 6, on the 23rd day of April, 1951, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, for an order of the above-entitled court reconsidering the ex parte order of March 20, 1951, extending the time to appeal, and for an order [38] vacating the same

and striking said order and affidavit in support thereof from the files and records of the above-entitled action.

Said motion will be made upon the ground that said ex parte order of March 20, 1951, purporting to extend the time within which to appeal in the above-entitled action to March 26, 1951, was made without notice to counsel for said plaintiff or upon motion made in open court, and without an opportunity for counsel for plaintiff to be heard or object thereto, and upon the further ground that the files, records, proceedings and dockets relating to the above-entitled cause affirmatively show that the clerk of the above-entitled court did enter said judgment on January 25, 1951, and did on said date notify all attorneys of the entry of said judgment.

Said motion will be based upon this notice of motion and upon all of the files, records and pleadings in the above-entitled action, and upon the affidavit of Everett W. Thompson served and filed herewith, and upon the Civil Docket of the above-entitled court and all entries therein relating to and pertaining to the above-entitled cause.

Dated: April 6, 1951.

BAUDER, GILBERT,
THOMPSON & KELLY,

By /s/ EVERETT W. THOMPSON,
Attorneys for Plaintiff. [39]

Points and Authorities

I.

It must be presumed that the Clerk, pursuant to his notation, entered in the Civil Docket, notified all attorneys of the entry of the judgment on January 25, 1951, and did forward to each of said attorneys a copy of said notice of entry found in the file in the above-entitled action.

II.

Rule 77(d) of the Federal Rules of Civil Procedure, in part, provides as follows:

> "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a) as amended December 27, 1946, effective March 19, 1948."

III.

Rule 73(a) of the Federal Rules of Civil Procedure, in part, provides as follows:

> "When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be thirty days from the entry of the judgment appealed from . . . except upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the District Court in any action may extend the time to appeal for not exceeding thirty days from the expiration of the original time herein prescribed." [40]

IV.

In Rules of the United States Court of Appeals for the Ninth Circuit it is stated (see statement preceding Rule 1):

> "The Federal Rules of Civil Procedure, whenever applicable, are hereby adopted as part of the rules of this court with respect to appeals in actions of a civil nature."

V.

Rule 6(b) of Federal Rules of Civil Procedure provides, in part, as follows:

> "When by these rules . . . an act is required or allowed to be done within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules . . . 73(a) . . . except to the extent and under the conditions stated in them." (Emphasis added.)

[Title of District Court and Cause.]

AFFIDAVIT OF EVERETT W. THOMPSON

State of California,
County of Los Angeles—ss.

Everett W. Thompson, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice in all of the courts of the State of California, and in the above-entitled court; that he is one of the attorneys of record for the plaintiff in the above-entitled action and the attorney who has been and is in charge of the handling of the above-entitled action on behalf of the plaintiff. [42]

That the first notice affiant had that intervener intended to appeal from the judgment in favor of the plaintiff and against said intervener, and entered in the above-entitled cause on January 25, 1951, was receipt by mail on March 23, 1951, of a purported Notice of Appeal, containing an affidavit of service upon affiant's office alleging that said Notice of Appeal was served on March 22, 1951. That neither affiant nor affiant's office was notified in writing prior thereto, and particularly on or about March 20, 1951, that counsel for intervener would attempt to secure an extension of time to appeal from the judgment entered against said intervener and in favor of said plaintiff, and no motion or notice of motion was ever served upon affiant or affiant's office notifying the attorneys of record for plaintiff that counsel for intervener

would seek or attempt to secure an extension of time within which to appeal beyond the thirty day period prescribed by the Federal Rules of Civil Procedure, and no copy of any affidavit filed in support of any order purporting to extend the time to appeal, or said order, or either of them, was ever served upon affiant or affiant's office at ny time. That affiant is the attorney in the office of the attorneys of record for plaintiff who has had charge of the above-entitled action, and particularly the trial of the intervention action on or about December 22, 1950.

That affiant has been engaged in the trial of civil matters in the Superior Court of the State of California practically continuously since March 23, 1951. That affiant has recently inspected the Civil Docket in the above-entitled action and said civil docket does state that attorneys were notified of the entry of the judgment on January 25, 1951. That affiant did receive from the clerk of the above-entitled court on January 26, 1951, a copy of the Notice of Entry of Judgment which is attached hereto, marked "Exhibit A" and made a part hereof with the same force and effect as if fully set out herein, and that the file in the above-entitled [43] action does contain a copy or duplicate of said notice which is attached hereto and marked "Exhibit A." That affiant is informed and believes and alleges that said notice was sent to all attorneys of record in the above-entitled action, as indicated by the entry of the clerk in said civil docket.

That the affidavit filed in support of the order

purporting to extend the time on appeal states no facts by which it could be concluded that there was any inadvertence or excusable neglect other than "because he (counsel for intervener) was not aware of the entry of said judgment and did not receive notice of such entry."

Wherefore, affiant prays that an order of the above-entitled court be made and entered vacating and setting aside the ex parte order of March 20, 1951, purporting to extend the time to appeal in the above-entitled action and to strike said order and affidavit in support thereof from the files and records of the above-entitled court.

/s/ EVERETT W. THOMPSON.

Subscribed and sworn to before me this 6th day of April, 1951.

[Seal] /s/ ROSE SCHINDELMAN,
Notary Public in and for
Said County and State. [44]

EXHIBIT A

United States District Court, Southern District of California, Central Division

Bauder, Gilbert, Thompson & Kelly, Esqs., 639 Rowan Bldg., Los Angeles 13, Calif.

Donald Armstrong, Esq., 1308 Sartori, Ave., Torrance, Calif.

Menzies & Watt, Esqs., 1017 Rowan Bldg., Los Angeles 13, Calif.

Guthrie, Lonergan & Jordan, Esqs., 506 Anderson Bldg., San Bernardino, Calif.

Edgar B. Hervey, Esq., San Diego Trust & Savings Bldg., San Diego 1, Calif.

Luce, Forward, Lee & Kunzel, Esqs., 1220 San Diego Trust & Savings Bldg., San Diego 1, Calif.

Re: Standard Accident Insurance Co. of Detroit, vs. Home Indemnity Company of New York, et al., No. 5729-C

You are hereby notified that judgment has been entered this day in the above-entitled case, in Judgment Book No. 70, page 470.

Dated: Los Angeles, California,

January 25, 1951.

EDMUND L. SMITH,
Clerk,

By C. A. SIMMONS,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 6, 1951. [45]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Intervener, North Umberland Mining Company, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment given and made in the above-entitled action in favor of plaintiff therein and against Intervener, North Umberland Mining Company, and entered on the 25th day of January, 1951, and from the whole and every part of said Judgment.

Dated: March 22, 1951.

/s/ DONALD ARMSTRONG,
Attorney for Intervener, North Umberland Mining Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 23, 1951. [51]

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 23rd day of April in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing motion of plaintiff, filed April 6, 1951, to vacate the ex parte order of March 20, 1951, extending time to appeal; Jean Wunderlich, Esq., appearing as counsel for plaintiff; Donald Armstrong, Esq., appearing as counsel for intervening plaintiff North Umberland Mining Co.; no appearance for defendants;

Attorney Wunderlich argues in support of the motion. Attorney Armstrong argues in opposition.

The Court declines to rule on the motion and orders it off calendar on the ground that if the order extending time was a voidable order, the taking of the appeal has robbed the District Court of jurisdiction; and if, on the other hand, it is a void order, it is void without this Court acting thereon. [65]

OPINION

The Opinion of the U. S. Court of Appeals for the Ninth Circuit in Cause No. 11661, Home Indemnity Co. of New York vs. Standard Accident Insurance Co. of Detroit, et al. is set forth at 167 F. (2d) 918, and is not reprinted here for purpose of economy.

In the United States District Court, Southern District of California, Central Division

No. 5729-C—Civil

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a Corporation,

Plaintiff,

vs.

HOME INDEMNITY COMPANY OF NEW YORK, a Corporation, et al.,

Defendants.

Honorable James M. Carter, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Friday, December 22, 1950

Appearances:

For the Plaintiff:

BAUDER, GILBERT, THOMPSON & KELLY, by

E. W. THOMPSON, ESQ.,
939 Rowan Building,
Los Angeles 13, California.

For the Intervener, North Umberland Mining Company:

DONALD ARMSTRONG, ESQ.,
1308 Sartori Avenue,
Torrance, California.

For the Defendant, George White:
LUCE, FORWARD, LEE & KUNZEL, by
EDGAR LUCE, JR., ESQ.

Mr. Armstrong: May it please the court, if I may say so, I think we could shorten this proceeding materially. We don't propose to offer any additional evidence that is not already before the court, and we intend to stipulate as to supplemental facts.

The Court: What evidence is before me? A transcript of what occurred before O'Connor?

Mr. Armstrong: I don't think it is necessary to have that entire transcript before you. As a matter of fact, I have just been talking to Mr. Thompson, and I think that as far as the case of the intervener is concerned, we are willing to stipulate that the facts recited in the opinion filed by the United States Court of Appeals for the Ninth Circuit [2*] is sufficient for this purpose, with the supplemental stipulation that the judgments in the San Diego proceedings were entered and satisfied, and in a moment we will refer to them with more particularity.

Isn't that about all we will need, Mr. Thompson?

Mr. Thompson: I think that is substantially correct. I discussed this matter at length this morning with Mr. Armstrong. I think this stipulation will eliminate the necessity of any oral testimony and the introduction of any documentary evidence, except two exhibits which we will refer to in a moment, and it is stipulated that judgments were

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

entered as pleaded in the complaint in intervention, that those judgments were satisfied. It is, of course, also stipulated that those judgments were entered pursuant to a stipulated judgment, without the consent or any stipulation on behalf of the Standard.

The Court: Who stipulated to those judgments?

Mr. Thompson: Judgments were stipulated to by counsel representing the North Umberland Mining Company and counsel in San Diego representing White.

The Court: And the plaintiff's attorney?

Mr. Armstrong: And the plaintiffs in the respective actions.

Mr. Thompson: The plaintiff in the respective actions; not the plaintiff Standard in this action. [3]

The Court: So counsel for the Standard Accident or the Home Indemnity, neither one stipulated to those judgments?

Mr. Thompson: Counsel for the Standard Accident was not present, did not agree to and did not stipulate to those judgments.

The Court: That is agreed to, is it?

Mr. Armstrong: Yes, your Honor. But the judgments were satisfied by North Umberland, and no payment of any sort was made by the defendant White at that time or any other time.

The Court: From reading the file, this current file, there seemed to be some little question about who paid the judgment. The judgment was paid by the North Umberland Mining Company?

Mr. Armstrong: That's right; and they were defendants in the two San Diego actions.

The Court: That is agreed, is it?

Mr. Thompson: As far as a matter of record is concerned, North Umberland Company being the named insured under the Home policy, it paid the judgment on behalf of the North Umberland, so it is for the benefit of them.

The Court: The true facts are that the Home stood the bill, but it was actually paid for and on behalf of and in substance by the North Umberland Mining Company?

Mr. Thompson: That's right. [4]

The Court: Then there is no dispute about that?

Mr. Armstrong: If you will pardon me——

Mr. Thompson: It is a question of construction, we are both agreed.

Mr. Armstrong: I would like to have the stipulation in the record a little more clearly than it is at the present time, and I would like to in that behalf ask Mr. Thompson, in addition to the stipulation that he has made, to stipulate that the actions that were referred to in which the judgments were entered and satisfied were the judgments alleged in paragraphs VIII and IX, and paragraph XI of the complaint in intervention.

The Court: Of the North Umberland Mining Company?

Mr. Armstrong: That is correct.

Mr. Thompson: There is no doubt about that.

Mr. Armstrong: I want to be sure there will be no misunderstanding about what judgments and what actions we are referring to.

And the policies that we refer to are the Standard

Accident policy, which is attached to plaintiff's complaint and marked Exhibit A in this action, that is to say, the declaratory relief action, and the policy that it attached to the answer of Home Indemnity Company in the declaratory relief action.

Mr. Thompson: Yes. [5]

The Court: It is stipulated those are the policies?

Mr. Thompson: Those are the two policies, and it is agreed they may be marked Exhibits by way of reference in this proceeding, each of said policies of insurance.

Mr. Armstrong: So stipulated.

The Court: Now we are all agreed that those are the facts?

Mr. Armstrong: Correct, your Honor.

Now, I think we can go further than that to save time. I think we can narrow the issues and confine the argument to that narrow issue, that is, that the liability and rights of the parties in this proceeding are to be determined by the construction to be placed by the court on paragraphs VII and VIII of the Standard policy, together with condition 13 of that policy.

Mr. Thompson: Upon the entire terminology of the policy with particular reference to those paragraphs.

Mr. Armstrong: Of course.

Mr. Thompson: Those are the pertinent sections.

The Court: Those are the pertinent sections, but actually it will be a matter of construction of the whole policy.

Mr. Thompson: That's right.

Mr. Armstrong: Yes. And in deciding that question it will be necessary to also construe certain provisions of the Home Indemnity policy, and I will refer to them. [6]

The Clerk: Is there more than one answer of the Home Indemnity in this case?

Mr. Armstrong: There is only one answer of the Home Indemnity.

The Clerk: I don't see that policy that you referred to as being attached.

Mr. Armstrong: On the record on appeal, that is the one I have, the answer of Home Indemnity——

Mr. Thompson: It is Exhibit A to the answer of Home Indemnity Company.

The Clerk: Maybe it was taken out of the file. Do you have a copy of it, your Honor?

The Court: I don't have a copy with me. It may be back in the file somewhere. But I don't have the Circuit Court transcript.

Mr. Thompson: I have a photostatic copy of each. It might be easier to mark it here for that purpose.

The Court: Let's do that.

The Clerk: Intervener's Exhibits 1 and 2?

Mr. Armstrong: Yes.

The Court: The Standard Accident policy will be Intervener's Exhibit 1, and the Home Indemnity policy will be Intervener's Exhibit 2.

(The documents referred to were marked Intervener's Exhibits 1 and 2, respectively, and were received in evidence.) [7]

EXHIBIT A

INTERVENER'S EXHIBIT NO. 1

Automobile Bodily Injury Liability Policy

Standard
Accident Insurance Company

No. J 427867

DETROIT, MICHIGAN
A Stock Company

DECLARATIONS

Item

1 Name and address of insured 52

WHITE, GEORGE
9510 WILSHIRE BLVD
BEVERLY HILLS CALIF

Policy period from SEPTEMBER 29TH 1945 to SEPTEMBER 29TH 1946

12:01 A. M. standard time at the address of the named insured as stated herein.
The automobile will be principally garaged in the above town, county and state unless otherwise specified herein.

The occupation of the named insured is PROD CLR Individual [x] Copartnership [ ] Corporation [ ] Estate [ ]

II No insurer has cancelled any automobile insurance issued to the named insured during the past year, except as herein stated: NO EXCEPTIONS

III The purposes for which the automobile is to be used are [x] Pleasure and business [ ] Commercial

IV Description of the automobile:

Year & Model	Trade Name of Automobile	Type of Body	Motor Number	Serial Number
1942 2121 1599	PACKARD	5 PS CONV CPE	E- 595018	1599- 2312

New or Used	Date Purchased Month Year	Cost to Insured	V Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile except as herein stated.
NEW	OCT 1941	1600	NO EXCEPTIONS

VI The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of the policy having reference thereto.

Coverages	Limits of Liability			Policy No.	Premiums
(a) Bodily Injury Liability	$25 000 each person	$50 000 each accident		J-427867	$19 42
(c) Medical Payments	500 each person (named insured included)	5000 each accident			7 50

Countersigned at Los Angeles, California, by Louis Bass
Authorized Agent

Not valid unless countersigned by a duly authorized Agent of the Company.

Read your policy.

Form Auto 88 Ed. Oct., 1944 (C.&J.) (Page 1)

Exhibit A - Page 1

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[15]

Automobile Bodily Injury Liability Policy

Standard Accident Insurance Company

DETROIT, MICHIGAN

(A STOCK INSURANCE COMPANY, HEREIN CALLED THE COMPANY)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I **Coverage A—Bodily Injury Liability** . . . . . To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage C—Medical Payments . . . . . To pay to or for each person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from (1) the automobile classified as "pleasure and business" if the injury arises out of the use thereof by or with the permission of the named insured, or (2) any other private passenger automobile with respect to the use of which insurance is afforded under Insuring Agreement VII of this policy, if the injury arises out of the use thereof and results from (a) the operation of said automobile by the named insured or spouse or by a private chauffeur or domestic servant of either or (b) the occupancy of said automobile by the named insured or spouse, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of accident.

The insurance afforded with respect to such other automobiles shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

II **Defense, Settlement, Supplementary Payments** . . . . . As respects such insurance as is afforded by the other terms of this policy under coverage A the company shall

(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(c) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

III **Bail Bond Expense** . . . . . The company shall pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or a traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage A of this policy. The company's liability under this insuring agreement with respect to each bond shall not exceed the usual charges of surety companies for such bond nor $100.

IV **Definition of "Insured"** . . . . . The unqualified word "insured" wherever used in coverage A and in other parts of this policy, when applicable to such coverage, includes the named insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured. The insurance with respect to any person or organization other than the named insured does not apply:

(a) to injury to or death of any person who is a named insured;

(b) with respect to the automobile while used with any trailer not covered by like insurance in the company; or with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

V **Automobile Defined, Trailers, Two or More Automobiles** . . . . . Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semitrailer described in this policy. The word "trailer" shall include semitrailer.

Such insurance as is afforded by this policy for bodily injury liability with respect to a private passenger automobile applies also to a trailer not described in this policy while used with such automobile, if such trailer is designed for use with a private passenger automobile and is not a home, cabin, office, store, product or process display, demonstration or passenger trailer. While not used with such automobile, such insurance applies also to such trailer but only with respect to the named insured and does not apply to the use of the trailer in his business occupation or with an automobile of the commercial or truck type owned or used by him.

When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverage A.

VI **Purposes of Use Defined** . . . . . (a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1 of the declarations, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

VII **Use of Other Automobiles** . . . . . Such insurance as is afforded by this policy for bodily injury liability with respect to the automobile classified as "pleasure and business" applies (1) to the named insured, if an individual and the owner of such automobile, or if husband and wife either or both of whom own such automobile, and (2) to the spouse of such individual if a resident of the same household, to the employer of such named insured or spouse and to the parent or guardian of such named insured or spouse, if a minor, as insured, with respect to the use of any other automobile by or in behalf of such named insured or spouse.

This insuring agreement does not apply:

(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(b) with respect to such employer, parent or guardian, to any automobile owned in full or in part by him or registered in his name or hired by him as part of a frequent use of hired automobiles;

(c) to any automobile not of the private passenger type while used in the business or occupation of the named insured or spouse, or to any private passenger automobile while used in such business or occupation if operated by a person other than the named insured or spouse or such chauffeur or servant unless the named insured or spouse is present in such automobile;

(d) to any insured other than as defined in this insuring agreement;

(e) to injury to or death of any person who is a named insured;

(f) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

VIII **Temporary Use of Substitute Automobile** . . . . . While an automobile owned in full or in part by the named insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner.

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IX **Automatic Insurance for Newly ... dred Automobiles** ... I. ... named insured who is the owner of the automobile acquires ownership of a ... ther automobile and so notifies the company w... thirty days following the date of its delivery to him, such insurance as is afforded by this policy applies also to such other automobile as of such delivery date:

(a) if it replaces an automobile described in this policy, but only to the extent the insurance is applicable to the replaced automobile, or

(b) if it is an additional automobile and if the company insures all automobiles owned by the named insured at such delivery date, but only to the extent the insurance is applicable to all such previously owned automobiles.

This insuring agreement does not apply: (a) to any loss against which the named insured has other valid and collectible insurance, or (b) except during the policy period, but if such delivery date is prior to the effective data of this policy, the insurance applies as of such effective date.

The named insured shall pay any additional premium required because of the application of the insurance to such other automobile. The insurance terminates upon the replaced automobile on each delivery date.

X **Policy Period, Territory, Purposes of Use** ... This policy applies only to accidents which occur during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

EXCLUSIONS

This policy does not apply:

(a) under any of the coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) under any of the coverages, to liability assumed by the insured under any contract or agreement;

(c) under coverage A, while the automobile is used for the towing of any trailer owned or hired by the named insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the named insured and not covered by like insurance in the company;

(d) under coverages A and C, to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the automobile;

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(f) under coverage C, to bodily injury to or death of (1) any person to or for whom benefits are payable under any workmen's compensation law because of such injury or death, or (2) the named insured if stated as excluded in the declarations, but if the named insured is two or more individuals, the named insured, for the purposes of this exclusion, shall be the individual or individuals in whose name the automobile is registered.

CONDITIONS

Conditions 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 apply only to the coverage or coverages noted thereunder.

1 **Limits of Liability—Coverage A** ... The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

2 **Limit of Liability—Coverage C** ... The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, including death resulting therefrom, in any one accident.

3 **Limits of Liability** ... The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

4 **Financial Responsibility Laws—Coverage A** ... Such insurance as is afforded by this policy for bodily injury liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

5 **Assault and Battery—Coverage A** ... Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

6 **Notice of Accident** ... When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

7 **Notice of Claim or Suit—Coverage A** ... If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

8 **Assistance and Cooperation of the Insured—Coverage A** ... The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

9 **Medical and Other Reports; Examination—Coverage C** ... The injured person or someone on his behalf shall, as soon as practicable after each request from the company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

10 **Proof and Payment of Claim—Coverage C** ... As soon as practicable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for medical payments or after the expiration of one year from the date of the accident, whichever is the first, the injured person or someone on his behalf shall give to the company written proof of claim under oath, stating the name and address of each person and organization which has rendered services, the nature and extent and the dates of rendition of such services, the itemized charges therefor and the amounts paid thereon. Upon the company's request, the injured person or someone on his behalf shall cause to be given to the company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The company shall have the right to make payment at any time to the injured person or to any such person or organization on account of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for such injured person on account of such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

11 **Action Against Company—Coverage A** ... No action shall be against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

12 **Action Against Company—Coverage C** ... No action shall be against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.

13 **Other Insurance—Coverage A** ... If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss, provided, however, the insurance under Insuring Agreements VII and VIII shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under either or both of said insuring agreements.

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14 **Subrogation—Coverage A** . . . . In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

15 **Changes** . . . . Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the president, a vice president, or the secretary of the company.

16 **Assignment** . . . . Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverage A, subject otherwise to the provisions of Insuring Agreement IV, any person having proper temporary custody of the automobile, as an insured, and under coverage C while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

17 **Cancelation** . . . . This policy may be canceled by the named insured by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.
If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

18 **Declarations** . . . . By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, ... the **STANDARD ACCIDENT INSURANCE COMPANY** has caused this policy to be signed by its president and secretary at Detroit, Michigan, and countersigned on the declarations page by a duly authorized agent of the company.

F. Brown
Secretary

Charles C. Bowen
President

MEXICAN COVERAGE ENDORSEMENT

In consideration of the premium for the policy to which this endorsement is attached and of which it forms a part, it is hereby understood and agreed that such insurance as is afforded by the policy is extended to apply while the automobile is being used for trips into the Republic of Mexico, PROVIDED THAT, this endorsement does not apply unless the insured's place of residence is within the United States of America and the automobile insured by the policy is principally garaged, maintained and used within the United States of America.

This endorsement forms a part of the Automobile Bodily Injury Liability Policy to which it is attached.

Standard Accident Insurance Company

F. Brown
Secretary

(Page 6)

Standard
Accident Insurance Company
DETROIT, MICHIGAN
A STOCK COMPANY

AUTOMOBILE
BODILY INJURY
LIABILITY POLICY

No. J 427867

READ YOUR POLICY

INSURANCE BUREAU
of the
AUTOMOBILE CLUB
OF SOUTHERN CALIFORNIA
FIGUEROA AT ADAMS · LOS ANGELES
RALPH REYNOLDS, MANAGER
TELEPHONE RICHMOND

Exhibit A

Admitted December 22, 1950.

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[Endorsed]: Filed Sep. 4, 1936. [18]

EXHIBIT "A"

INTERVENER'S EXHIBIT NO. 2

(2)

PACIFIC

Combination Automobile Policy

PAGE ONE

Policy No. CAU 6011452

Renewal No. CAU 11372153

Agency at

ISSUED BY

THE HOME INSURANCE COMPANY, NEW YORK

A STOCK COMPANY

— AND —

THE HOME INDEMNITY COMPANY, NEW YORK

A STOCK COMPANY

DECLARATIONS

Item 1 NAME OF INSURED WALTER HAGGERTY and NORTHUMBERLAND ... CO. JOINTLY ... AS THEIR RESPECTIVE INTEREST MAY APPEAR.

ADDRESS BEVERLY WILSHIRE HOTEL, BEVERLY HILLS, CALIFORNIA
No. Street Town or City County State

OCCUPATION of the Named Insured is PRIVATE INVESTMENTS

EMPLOYER

GARAGE The automobile will be principally garaged in the above town or city, county and state unless otherwise stated herein:

Item 2 POLICY PERIOD: From DECEMBER 2, 1945 to DECEMBER 2, 1946
12:01 A. M., Standard Time at the address of the named insured as stated herein

Item 3 LOSS PAYEE: Any loss under Coverages D, E, E1, F, G, H and I is payable as interest may appear to the named insured and
Name and Address

Item 4 THE INSURANCE AFFORDED is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto:

SPECIMEN POLICY

COVERAGES	LIMITS OF LIABILITY		Net Rates	PREMIUMS The Home Indemnity Co.	PREMIUMS The Home Insurance Co.
A—Bodily Injury Liability	$ 100,000.	each person			
	$ 300,000.	each accident	X X X	$ 23.29	X X X X X
B—Property Damage Liability	$ 5,000.	each accident	X X X	$ 9.50	X X X X X
C—Medical Payments (Named Insured Insert "Included" or "excluded")	$	each person	X X X	$	X X X X X
D—Comprehensive—Loss of or damage to the Automobile, except by Collision but including Fire, Theft and Windstorm	ACTUAL CASH VALUE $ (Insert Amount or "Actual Cash Value")		$	X X X X X	$ 7.00
E—Collision or Upset	Actual Cash Value less $	Deductible	X X X	X X X X X	$
E1—Convertible Collision or Upset Additional Payment $	Actual Cash Value		X X X	X X X X X	$
F—Fire, Lightning and Transportation	$ ACTUAL CASH VALUE		$	X X X X X	$ INCL.
G—Theft (Broad Form)	" " "		$	X X X X X	$ INCL.
N—Combined Additional Coverage	$		$	X X X X X	$
I—Personal Effects (Fire, Lightning and Transportation Coverage Only)	$		$	X X X X X	$
80% ... per endorsement attached	$		$	$	$ 62.00
LIAB. AMENDMENT FORM H-6849		TOTAL PREMIUM		$ 32.79	$ 69.00
LTD. KEY. END. #2223 CLASS A		GRAND TOTAL PREMIUM			$ 101.79

Item 5. Description of the automobile and facts respecting its purchase by the named insured

1. Model 2. Year	Trade Name	Body Type; Truck Load Capacity or Factory Gross Weight; Tank Gallonage Capacity or Bus Seating Capacity	1. Serial Number 2. Motor Number	Number of Cylinders
1. 269 2. 1942	LINCOLN ZEPHYR	FOUR DOOR SEDAN	1. 2. 132537	12

F.O.B. List Price or Delivered Price at Factory	Actual Cost When Purchased Including Equipment	Purchased Month, Year	New or Used	Encumbrance	Installment Payments Number	Amount of Each	Due date and Amount of Final Installment
$ NI"	$ 2479.00	AUG. 1943	USED	$ NIL		$	$

The automobile is unencumbered unless otherwise stated herein:

Item 6 Use: The purposes for which the automobile is to be used are BUSINESS & PLEASURE
(a) The term "pleasure and business" is defined as personal, pleasure, family and business use.
(b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes.
(c) Use of the automobile for the purposes stated includes the loading and unloading thereof

Item 7 (a) Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile. (b) During the past year no insurer has cancelled any automobile insurance issued to the named insured
NO EXCEPTIONS
Exception if any, to (a) or (b)

Date and Place of Issue 11-30-45, NORTH HOLLYWOOD, CALIFORNIA Countersigned by CHESTER DE YOUNG
Agent

THE HOME INSURANCE COMPANY, NEW YORK
AND
THE HOME INDEMNITY COMPANY, NEW YORK
(Each a Stock Insurance Company herein called the Company)

Severally agree with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, provided that **THE HOME INDEMNITY COMPANY, NEW YORK** shall be the insurer with respect to Coverages A, B and C and no other, and **THE HOME INSURANCE COMPANY, NEW YORK** shall be the insurer with respect to Coverages O, E, E1, F, G, H and I and no other

INSURING AGREEMENTS

I Coverage A—BODILY INJURY LIABILITY

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—PROPERTY DAMAGE LIABILITY

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage C—MEDICAL PAYMENTS

To pay to or for each person who sustains bodily injury, caused by accident and arising out of the use of the automobile classified as "pleasure and business," while in or upon, entering or alighting from the automobile while the automobile is used by or with the permission of the named insured, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expenses, all incurred within one year from the date of accident.

Coverage D—COMPREHENSIVE LOSS OF OR DAMAGE TO THE AUTOMOBILE, EXCEPT BY COLLISION

To pay for any loss of or damage to the automobile, hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

Coverage E—COLLISION OR UPSET

To pay for loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto.

Coverage E-1—CONVERTIBLE COLLISION OR UPSET

To pay for loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile. Upon the occurrence of the first loss for which payment is sought hereunder the insured shall pay to the company the additional payment stated in the declarations. Loss caused by collision or upset occurring prior to the first loss for which payment is sought hereunder is not covered.

Coverage F—FIRE, LIGHTNING AND TRANSPORTATION

To pay for loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water.

Coverage G—THEFT (BROAD FORM)

To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.

Coverage H—COMBINED ADDITIONAL COVERAGE

To pay for loss of or damage to the automobile, hereinafter called loss, caused by windstorm, earthquake, explosion, hail, external discharge or leakage of water, flood or rising waters, riot or civil commotion, or the forced landing or falling of any aircraft or of its parts or equipment.

Coverage I—PERSONAL EFFECTS

To pay for loss of or damage caused by fire, lightning or transportation, as defined in this policy, to robes, wearing apparel and other personal effects which are the property of the insured or of any other person in the insured's household, while carried in or upon the automobile.

II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS

As respects such insurance as is afforded by the other terms of this policy

(a) under coverages A and B the company shall

1. defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such allegations are groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

2. pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(b) the company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

III. DEFINITION OF "INSURED"

The unqualified word "insured" wherever used in coverages A and B and in other parts of this policy, when applicable to such coverages, includes the named insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission or the named insured. The insurance with respect to any person or organization other than the named insured does not apply:

(a) to injury to or death of any person who is a named insured;

(b) with respect to the automobile while used with any trailer not covered by like insurance in the company; or with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

IV. AUTOMOBILE DEFINED, TRAILERS, TWO OR MORE AUTOMOBILES

Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semitrailer described in this policy. The word "trailer" shall include semitrailer.

Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to a private passenger automobile applies also to a trailer not described in this policy while used with such automobile, if such trailer is designed for use with a private passenger automobile and is not a house, cabin, office, store, product or process display, demonstration or passenger trailer. While not used with such automobile, such insurance applies also to such trailer but only with respect to the named insured and does not apply to the use of the trailer in his business occupation or with an automobile of the commercial or truck type owned or used by him.

The word "automobile" shall also include under coverages D, E, E1, F, G and H its equipment and other equipment permanently attached thereto.

When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B and separate automobiles as respects limits of liability, including any deductible provisions, under coverages D, E, E1, F, G, H and I.

V USE OF OTHER PRIVATE PASSENGER AUTOMOBILES

Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to the automobile classified as "pleasure and business" applies (1) to the named insured, if an individual and the owner of such automobile or if husband and wife either or both of whom own such automobile, and (2) to the spouse of such individual if a resident of the same household and to the employer of such named insured or spouse, as insured, with respect to the operation of any other private passenger automobile by such named insured or spouse or by a private chauffeur or domestic servant thereof or with respect to the presence of any such person in such other automobile. This insuring agreement does not apply:

(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than such chauffeur or servant;

(b) with respect to such employer, to any automobile owned in full or in part by him or registered in his name or hired by him as part of a frequent use of hired automobiles;

(c) to any insured other than as defined in this insuring agreement;

(d) to injury to or death of any person who is a named insured.

(e) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

VI. TEMPORARY USE OF SUBSTITUTE AUTOMOBILE

While an automobile owned in full or in part by the named insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner.

VII LOSS OF USE BY THEFT—RENTAL REIMBURSEMENT

The company, following a theft covered under this policy, shall reimburse the named insured for expense not exceeding $5 for any one day nor totaling more than $150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxicabs

Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the automobile becomes known to the named insured or the company or on such earlier date as the company makes or tenders settlement for such theft.

Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

VIII. GENERAL AVERAGE AND SALVAGE CHARGES

The company, with respect to such transportation insurance as is afforded by this policy, shall pay any general average and salvage charges for which the named insured becomes legally liable.

IX. AUTOMATIC INSURANCE FOR NEWLY ACQUIRED AUTOMOBILES

If the named insured who is the owner of the automobile acquires ownership of another automobile and so notifies the company within thirty days following the date of its delivery to him, such insurance as is afforded by this policy applies also to such other automobile as of such delivery date:

(a) if it replaces an automobile described in this policy, but only to the extent the insurance is applicable to the replaced automobile, or

(b) if it is an additional automobile and if the company insures all automobiles owned by the named insured at such delivery date, but only to the extent the insurance is applicable to all such previously owned automobiles;

provided, under coverages D, E, E1, F, G, H and I when a limit of liability is expressed in the declarations as actual cash value, such limit shall apply to such other automobile, and when a limit of liability is so expressed as a stated amount, such limit shall be replaced by the actual cash value of such other automobile, but any deductible amount so expressed shall apply in either case.

This insurance agreement does not apply. (a) to any loss against which the named insured has other valid and collectible insurance, or (b) except during the policy period, but if such delivery date is prior to the effective date of this policy, the insurance applies as of such effective date, or (c) under coverages D, E, E1, F, G, H and I, to automobiles owned and held for sale by automobile dealers.

The named insured shall pay any additional premium required because of the application of the insurance to such other automobile. The insurance terminates upon the replaced automobile on such delivery date.

X POLICY PERIOD, TERRITORY, PURPOSES OF USE

This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

EXCLUSIONS

This policy does not apply:

(a) under any of the coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) under coverages A, B and C, to liability assumed by the Insured under any contract or agreement;

(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the named insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the named insured and not covered by like insurance in the company;

(d) under coverages A and C, to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the automobile;

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(g) under coverage C, to bodily injury to or death of (1) any person to or for whom benefits are payable under any workmen's compensation law because of such injury or death, or (2) the named insured if stated as excluded in the declarations, but if the named insured is two or more individuals, the named insured, for the purposes of this exclusion, shall be the individual or individuals in whose name the automobile is registered;

(h) under coverages D, E, E1, F, G, H and I, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy;

(i) under coverages D, E, E1, F, G, H and I, to loss due to war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution or to confiscation by duly constituted governmental or civil authority;

(j) under coverages D, E, E1, F, G, H and I, to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy;

(k) under coverages D, E, E1, F, G, H and I, to robes, wearing apparel or personal effects carried in or upon the automobile, unless specifically insured under coverage "I," which coverage shall not apply to salesmen's samples, merchandise for sale or exhibition, theatrical wardrobes, deeds, accounts, bills, moneys, notes, securities or other evidences of debt, nor to property of guests, boarders or employees or property otherwise covered by insurance;

(l) under coverages D, E, E1, F, G, H and I, to tires unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;

(m) under coverages D and G, to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance;

(n) under coverages E and E1, to breakage of glass if insurance with respect to such breakage is otherwise afforded;

(o) under coverages E, E1, F, G and I, to loss due to riot or civil commotion;

(p) under coverages D, E, E1, F, G, H and I, while the automobile is used in any illicit trade or transportation.

CONDITIONS

1. NOTICE OF ACCIDENT Coverages A B and C — When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

2. NOTICE OF CLAIM OR SUIT Coverages A and B — If claim is made or suit is brought against the insured, the Insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

3. LIMITS OF LIABILITY Coverage A — The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident, the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

4. LIMIT OF LIABILITY Coverage C — The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, including death resulting therefrom, in any one accident.

5. LIMITS OF LIABILITY Coverages A, B and C — The inclusion herein of more than one Insured shall not operate to increase the limits of the company's liability.

6. ACTION AGAINST COMPANY Coverages A and B — No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

7. ACTION AGAINST COMPANY Coverage C — No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.

8. FINANCIAL RESPONSIBILITY LAWS Coverages A and B — Such Insurance as is afforded by this policy for bodily Injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The Insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

9. ASSAULT AND BATTERY Coverages A and B — Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

10. MEDICAL AND OTHER REPORTS, EXAMINATION Coverage C — The Injured person or someone on his behalf shall, as soon as practicable after each request from the company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

11. PROOF AND PAYMENT OF CLAIM Coverage C — As soon as practicable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for medical payments or after the expiration of one year from the date of the accident, whichever is the first, the injured person or someone on his behalf shall give to the company written proof of claim under oath, stating the name and address of each person and organization which has rendered services, the nature and extent and the dates of rendition of such services, the itemized charges therefor and the amounts paid thereon. Upon the company's request, the injured person or someone on his behalf shall cause to be given to the company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The company shall have the right to make payment at any time to the injured person or to any such person or organization on account of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for such injured person on account of such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company

12 NAMED INSURED'S DUTIES WHEN LOSS OCCURS Coverages D, E, E1, F, G, H and I — When loss occurs, the named insured shall:
(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the named insured's failure to protect shall not be recoverable under this policy, reasonable expense incurred in affording such protection shall be deemed incurred at the company's request.
(b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;
(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

Upon the company's request, the named insured shall exhibit the damaged property to the company and submit to examinations under oath by anyone designated by the company, subscribe the same and produce for the company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the company shall designate.

13 APPRAISAL Coverages D, E, E1, F, G, H and I — If the named insured and the company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the named insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The named insured and the company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

14 LIMIT OF LIABILITY, SETTLEMENT OPTIONS, NO ABANDONMENT Coverages D, E, E1, F, G, H and I — The limit of the company's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss nor what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations.

The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the company.

15 PAYMENT FOR LOSS, ACTION AGAINST COMPANY Coverages D, E, E1, F, G, H and I — Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

16. NO BENEFIT TO BAILEE Coverages D, E, E1, F, G, H and I — The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

17 ASSISTANCE AND COOPERATION OF THE INSURED Coverages A, B, D, E, E1, F, G, H and I — The insured shall cooperate with the company and, upon the company's request, shall attend hearings and ~~trials and shall assist in~~ effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

18 SUBROGATION Coverages A, B, D, E, E1, F, G, H and I — In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

19 OTHER INSURANCE Coverages A, B, D, E, E1, F, G, H and I — If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss, provided, however, the insurance under Insuring Agreements V and VI shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under either or both of said insuring agreements.

20 CHANGES Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy nor estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President or Secretary of the company.

21 ASSIGNMENT Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage C while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

22 CANCELATION This policy may be canceled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

23 TERMS OF POLICY CONFORMED TO STATUTE — Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

24 DECLARATIONS By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, THE HOME INSURANCE COMPANY, NEW YORK, has caused this policy, with respect to Coverages D, E, E1, F, G, H and I and such other parts of the policy as are applicable thereto, to be executed and attested, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized agent of the company.

Secretary *President*

IN WITNESS WHEREOF, THE HOME INDEMNITY COMPANY, NEW YORK, has caused this policy, with respect to Coverages A, B and C and such other parts of the policy as are applicable thereto, to be executed and attested, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized agent of the company

Secretary *President*

PACIFIC
COMBINATION AUTOMOBILE POLICY

NUMBER
CAU 6011452

THE HOME
INSURANCE COMPANY
NEW YORK

AND

THE HOME
INDEMNITY COMPANY
NEW YORK

PLEASE READ YOUR POLICY

Issued to
WALTER HAGGERTY & NORTHUMBERLAND
..INING CO.

Expires DECEMBER 2, 1946
At 12:01 A. M. Standard Time

IMPORTANT

Attention is called to the conditions of this policy which require an immediate notice of loss. No articles shall be replaced or repairs made without such notice or without the consent of this Company. A delay may invalidate your insurance.

In the event of an accident which results in bodily injuries or in damage to or the destruction of property of others, it is absolutely necessary that some occupant of the automobile should at once secure the names and addresses of all bystanders who were in the vicinity and who may ... have seen the accident.

AUTOMOBILE DEPARTMENT
59 Maiden Lane
NEW YORK, N. Y.

80% COLLISION COVERAGE

In consideration of an additional premium of $ INCLUDED, the policy designated below is extended to include coverage as follows:

80% COLLISION COVERAGE Loss of or damage to the automobile caused by collision of the automobile with another object or by upset of the automobile but not exceeding 80% of the first $250.00 and 100% of the amount in excess of $250 00 of each such loss or damage.

This Endorsement is subject to the limits of liability, exclusions, conditions and other terms of such policy which are not inconsistent herewith

This Endorsement, when countersigned by an authorized agent of the Company, and attached to Policy No 3Z CAU 6011452

of THE HOME **Insurance Company**, issued to .....

WALTER HAGGERTY etal shall form a part of said policy.

Countersigned at NORTH HOLLYWOOD, CALIF. this 2ND day of DECEMBER 1945

CHESTER DE YOUNG Agent

Au J2694A-5 A I—50M 11 45

[27]

AUTOMOBILE DEPARTMENT
59 Maiden Lane
NEW YORK, N. Y.

MEXICAN COVERAGE ENDORSEMENT
for Combination Automobile Policy

It is agreed that the coverage provided by the policy to which this endorsement is attached is extended to apply while any automobile insured hereunder is being operated in the Republic of Mexico for a period not exceeding ten (10) days at any one time subject to the following conditions:

1. Such insurance as is provided by this policy for bodily injury liability or property damage liability shall be excess insurance over any other valid and collectible insurance available to the insured.
2. As respects any loss or damage which may make necessary the repair of the insured automobile or replacement of any part or parts thereof while said automobile is in Mexican territary, under the coverages of Comprehensive, Fire, Theft, Collision, and Combined Additional Coverages, the basis of adjustment of claim for such repairs or replacement shall be the cost of such repairs or replacement at the nearest point in the United States where such repairs or replacement can be made; and it is expressly understood and agreed that the cost of towing or transportation or salvage operations of the insured automobile while within Mexican territary shall not be recoverable hereunder and is not a contingency insured against.
3. In the event any claim for loss or damage under the coverages of Comprehensive, Fire, Theft, Callision, and Combined Additianal Coverages is made against this Company while the insured automobile is inside the boundaries of the Republic of Mexico, the sustenance and transportation, or the cost of same, of one adjuster, if one be sent from the nearest United States border town to the location of the damaged automobile, shall be borne by the insured whenever the accident which is the basis of the claim shall have occurred at a point in excess of twenty-five (25) miles from the United States border over a passable highway.

Attached to and forming part of Automobile Policy No. CAU 6011452 issued by

THE HOME **Insurance Company** and **The Home Indemnity Company**

to WALTER HAGGERTY etal

Countersigned at North HOLLYWOOD, CALIF. this 2ND day of DECEMBER 1945

CHESTER DE YOUNG
Authorized Agent

President

Au 3223—5M-7 46

AMENDMENT OF AUTOMOBILE LIABILITY POLICY

It is agreed that the policy is amended as follows:

1. The following insuring agreement is added:

Bail Bond Expense

The company shall pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or a traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage A of this policy. The company's liability under this insuring agreement with respect to each bond shall not exceed the usual charges of surety companies for such bond nor $100.

2. Insuring Agreement V Use of Other Private Passenger Automobiles is amended to read as follows:

V Use of Other Automobiles

Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to the automobile classified as "pleasure and business" applies (1) to the named insured, if an individual and the owner of such automobile, or if husband and wife either or both of whom own such automobile, and (2) to the spouse of such individual if a resident of the same household, the employer of such named insured or spouse, the parent or guardian of such named insured or spouse, if a minor, and a partnership in which such named insured or spouse is a partner, as insured, with respect to the use of any other automobile by or in behalf of such named insured or spouse.

This insuring agreement does not apply:

(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(b) with respect to such employer, parent, guardian or partnership, to any automobile owned in foll or in part by him or registered in his name or hired by him as part of a frequent use of hired automobiles;

(c) to any automobile not of the private passenger type while used in the business or occupation of the named insured or spouse, or to any private passenger automobile while used in such business or occupation if operated by a person other than the named insured or spouse or such chauffeur or servant unless the named insured or spouse is present in such automobile;

(d) to any insured other than as defined in this insuring agreement;

(e) to injury to or death of any person who is a named insured;

(f) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

3. Coverage C—Medical Payments is amended to read as follows:

Coverage C—Medical Payments

To pay to or for each person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from (1) the automobile, if the injury arises out of a use thereof which is insured for bodily injury liability and is by or with the permission of the named insured, or (2) any other automobile with respect to the use of which insurance is afforded under Insuring Agreement V of this policy, if the injury arises out of the use thereof and results from (a) the operation of said automobile by the named insured or spouse or by a private chauffeur or domestic servant of either or (b) the occupancy of said automobile by the named insured or spouse, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of accident.

The insurance afforded with respect to such other automobiles shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

4. The word "automobile" as used in Coverage C—Medical Payments includes such trailers as are insured for bodily injury liability under the second paragraph of Insuring Agreement "Automobile Defined, Trailers, Two or More Automobiles," and no other trailers.

5. In exclusion (d), the words "or while engaged in the operation, maintenance or repair of the automobile" are deleted in connection with Coverage C—Medical Payments.

This endorsement forms a part of Policy No. CAU 6011452 issued to WALTER HAGGERTY etal
by **THE HOME INDEMNITY COMPANY**

and is effective from DECEMBER 2ND, 1945
(12:01 A.M. Standard Time)

Countersigned at NORTH HOLLYWOOD, CAL.

By CHESTER DE YOUNG
(Authorized Agent)

President

Form H 6000 V—XM 6-45
Printed in U.S.A.

Admitted December 22, 1950.

[Affidavit of Service by Mail]
[Endorsed]: Filed Sep. 24, 1946. [30]

[28]

* * *

The Court: How is this going to work out? Home put the money up for North Umberland Mining Company, North Umberland Mining Company paid the plaintiff's claims in the San Diego actions and is now entitled to be subrogated to the rights of those plaintiffs against White; is that right?

Mr. Thompson: Under 402(c) of the Vehicle Code.

The Court: So White is going to have to pay this money back to North Umberland who, in turn, will have to pay it back [43] to Home, is that right?

Mr. Armstrong: That is the way I understand it, your Honor.

Mr. Thompson: We are out of the record here, but that is the mechanics.

The Court: I am just trying to find out the mechanics. So actually as a practical matter this is White's claim against the Standard Accident?

Mr. Armstrong: That's right.

The Court: Isn't that right?

Mr. Thompson: That is what they are trying to assert here in an intervention proceeding.

The Court: Go ahead. [44]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and

correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of December A. D., 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed April 2, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 90, inclusive, contain the original Complaint in Intervention; Answer of Standard Accident Insurance Company of Detroit to Complaint in Intervention; Memorandum of Points and Authorities in re Issues Raised by Complaint in Intervention and Answers thereto; Findings of Fact and Conclusions of Law; Judgment; Affidavit and Order Extending Time to File Notice of Appeal; Notice of Motion and Motion for Order Reconsidering Ex Parte Order of March 20, 1951, Extending Time to Appeal, etc.; Statement of Reasons in Opposition and Answering Memorandum of Points and Authorities to Plaintiff's Notice of Motion to

Reconsider and Vacate Order Extending Time to Appeal; Notice of Appeal; Designation of Record on Appeal and Statement of Points; Designation of Additional Portions of Record on Appeal; Application and Order Extending Time to Docket Appeal and Stipulation and Order Designating Additional Portions of Record on Appeal and a full, true and correct copy of minute orders entered January 3, 1951, and April 23, 1951; Copy of Opinion of Circuit Court of Appeals for the Ninth Circuit in the case of Home Indemnity Co. of New York v. Standard Acc. Ins. Co. of Detroit et al. as reported in 167 F. 2d 919; and of the Docket Entries which, together with copy of reporter's transcript of proceedings on December 22, 1950, and original Intervener's Exhibits 1 and 2, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $7.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24th day of May, A. D. 1951.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12950. United States Court of Appeals for the Ninth Circuit. North Umberland Mining Company, a Corporation, Appellant, vs. Standard Accident Insurance Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 25, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

NORTH UMBERLAND MINING COMPANY, a Corporation,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a Corporation,

Appellee.

STATEMENT OF POINTS RELIED ON BY APPELLANT

Appellant proposes its appeal to rely on the following points as error:

1. The District Court erred in holding that the insurance provided for in the policy of Appellee, Standard Accident Insurance Company of Detroit, was excess and not primary coverage as it applied to the defendant George White.

2. The District Court erred in finding that the rights and obligations of defendant George White, defendant Home Indemnity Company of New York, and of Appellee Standard Accident Insurance Company of Detroit, respectively, became fixed at a date not later than the happening of the accident in which the Lincoln automobile driven by George White and covered by the policies of Appellee Standard Accident Insurance Company of Detroit and Home Indemnity Company of New York, occurred.

3. The District Court erred in the finding that the insurance afforded by the policy of Home Indemnity Company of New York was other available collectible insurance at the time of the accident within the meaning of that term as used in the policy of Appellee Standard Accident Insurance Company of Detroit.

4. The District Court erred in not finding that the insurance afforded by defendant Home Indemnity Company of New York did not become other available collectible insurance until all of the conditions precedent contained in said policy had been complied with by George White.

Dated: May 23, 1951.

/s/ DONALD ARMSTRONG,
Attorney for Appellant, North Umberland Mining Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 25, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL TO BE MADE BY RESPONDENT

I.

United States Court of Appeals for the Ninth Circuit has no jurisdiction to hear this matter on appeal.

II.

The District Court correctly decided that the insurance provided for in the policy of appellee, Standard Accident Insurance Company of Detroit, was excess and not primary coverage as it applied to the defendant, George White.

III.

The District Court correctly decided that the rights and obligations of the defendant, George White, as well as of appellant and appellee, respectively, became fixed as of the day of the accident in which the Lincoln automobile driven by George White was involved.

IV.

The District Court correctly decided that the insurance afforded by the policy of Home Indemnity Company of New York was other available collectible insurance at the time of the accident within the meaning of that term as used in the policy issued by appellee herein.

BAUDER, GILBERT,
THOMPSON & KELLY,

By /s/ EVERETT W. THOMPSON,
Attorneys for Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 31, 1951.